

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

BRUCE EDGAR SMITH, Petitioner, vs. DARIN YOUNG, BOB DOOLEY, MARTY JACKLEY, THE ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA; Respondents.	5:17-CV-05011-KES ORDER DENYING CERTIFICATE OF APPEALABILITY AND DENYING MOTION TO PROCEED IN FORMA PAUPERIS ON APPEAL
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Petitioner, Bruce Edgar Smith, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Docket 1. United States Magistrate Judge Veronica L. Duffy recommended dismissal of the petition. Docket 5. Smith filed a notice of interlocutory appeal, challenging Magistrate Judge Duffy's recommendation, and moves for leave to proceed in forma pauperis on appeal. Docket 6; Docket 7.

Smith moves this court to issue to him a certificate of appealability. A certificate of appealability may only be issued if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Smith is attempting to appeal from a report and recommendation of a Magistrate Judge before the district court has either accepted or rejected the report and recommendation.

The federal courts of appeals “may exercise jurisdiction only over final orders, and certain interlocutory and collateral orders[.]” *Washington v. Clarke*, 435 F. App’x 265, 266 (4th Cir. 2011) (citing 28 U.S.C. § 1291 (2006); 28 U.S.C. § 1292 (2006); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949)). Magistrate Judge Duffy’s report and recommendation is not a final order and is not an appealable interlocutory or collateral order. *Id.* Therefore, Smith may not appeal from the order until the district court has acted. Smith’s motion for a certificate of appealability is denied.

Smith moves for leave to proceed in forma pauperis on appeal. Docket 7. Under Federal Rules of Appellate Procedure 24, different rules apply to petitioners seeking leave to proceed in forma pauperis on appeal who have received prior approval to proceed in forma pauperis in the district court and those who have not. Smith moved for leave to proceed in forma pauperis. Docket 4. Magistrate Judge Duffy did not respond to this motion in her report and recommendation. The court now grants this motion.

Smith has now received approval for leave to proceed in forma pauperis in district court. Therefore, he “may proceed on appeal in forma pauperis without further authorization, unless” the court “certifies that the appeal is not taken in good faith” Fed. R. App. P. 24(a)(3). Here, Smith’s appeal is not taken in good faith. He did not wait for the district court to rule on the report and recommendation. Therefore, his appeal at this time is inappropriate.

Thus, it is ORDERED

1. Smith's motion for leave to proceed in forma pauperis (Docket 4) is granted.
2. Smith's motion for a certificate of appealability (Docket 6) is denied.
3. Smith's motion for leave to proceed in forma pauperis on appeal (Docket 7) is denied.

Dated March 28, 2017.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE